90-1045

No. _____

In The

Supreme Court of the United States

October Term, 1990

CAPITOL NEWS AGENCY CO., INC., *et al.*,

Petitioners,

v.

STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

GLENN A. STANKO
RENO, O'BYRNE & KEPLEY, P.C.
501 West Church Street
P.O. Box 693
Champaign, IL 61824-0693
(217) 352-7661

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a defendant charged with obscenity has standing to challenge the constitutionality of the statute under the First and Fourteenth Amendments to the Constitution of the United States by raising the invalidity of an exemption to that statute.

2. Whether a statutory provision which exempts persons from criminal liability for obscenity if the dissemination is to other persons having "scientific or other special justification for possession" of the material is violative of constitutional rights protected by the First and Fourteenth Amendments to the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

The petitioners are Capitol News Agency Co., Inc., an Illinois corporation; General Video Midwest, a division of Capitol News Agency Co., Inc.; Gentlemen's Books, Inc., an Illinois corporation, d/b/a Gentlemen's Bookstore; and Phillip D. Morgan. The corporate petitioners have no parent companies or nonwholly owned subsidiaries.

The respondent is the State of Illinois.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

No. _____

In The

Supreme Court of the United States

October Term, 1990

CAPITOL NEWS AGENCY CO., INC., *et al.*,

Petitioners,

v.

STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectively pray that a writ of certiorari issue to review the judgments and opinion of the Supreme Court of Illinois entered on May 23, 1990.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 137 Ill.2d 162, 560 N.E.2d 303 (1990). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. §1257(a), which provides for review by certiorari of the decisions of the Supreme Court of Illinois. A written opinion in petitioners' consolidated cases was issued by that court on May 23, 1990. Petitioners' timely petition for rehearing was denied on October 1, 1990. On the denial of rehearing, a modified opinion was issued. The modified opinion made only technical changes in the original opinion. A copy of the order denying the petition for rehearing is included in the Appendix as Exhibit C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States and the relevant portion of the Fourteenth Amendment to the Constitution of the United States are set forth in the Appendix as Exhibit D. The Illinois obscenity statute, Ill.Rev.Stat. 1985, ch. 38, ¶11-20, is set forth in the Appendix as Exhibit E.

STATEMENT OF THE CASE

On May 29, 1986, each of the petitioners was indicted for the sale or delivery of obscene materials in the Circuit Court of McLean County, Illinois. The four-count charge against Capitol News Agency Co., Inc. involved four magazines, while General Video Midwest was charged with two counts relating to two different video tapes.

Those same magazines and video tapes were the subject of the six-count indictments brought against Gentlemen's Books, Inc. and Phillip D. Morgan.

Motions to dismiss were filed by all petitioners asserting that the Illinois obscenity statute was unconstitutionally vague, indefinite, uncertain, and overbroad, and therefore violated their rights under the First and Fourteenth Amendments to the Constitution of the United States. Each petitioner specifically advanced a due process and equal protection challenge to an affirmative defense provision contained in the Illinois obscenity statute. The affirmative defense exempted a dissemination made "to institutions or individuals having scientific or other special justification for possession of such material." Ill.Rev.Stat. 1985, ch. 38, ¶11-20(f)(2).

After consolidated arguments on the motions to dismiss, the trial court entered an identical written order in each of the cases granting the respective motions. The trial court found that the "scientific or other special justification" language of the affirmative defense was unconstitutionally vague. It further held that the affirmative defense could not be severed from the remainder of the statute. Consequently, the Illinois obscenity statute was unconstitutionally vague in its entirety.

Although the state did not take a timely appeal to the Supreme Court of Illinois, leave was given by that court to file a late notice of appeal. All of the cases were consolidated for purposes of the appeal.

In an opinion filed on May 23, 1990, the Supreme Court of Illinois reversed the judgments of the Circuit Court of McLean County. It held that the petitioners had

no standing to challenge the constitutionality of the affirmative defense provision. Although the state had not raised the issue of standing in the lower court, the Supreme Court held that it was a question of subject matter jurisdiction which could be considered by the court at any time even if no party had raised the issue. The court's ruling did not address the petitioners' arguments that they had standing to make an attack on the exemption because they had a personal stake in the matter and, also, because First Amendment rights were directly involved.

Notwithstanding its ruling on the standing issue, the opinion of the Supreme Court of Illinois addressed the merits of the argument relating to the vagueness of the affirmative defense provision. Relying extensively on *People v. Illardo*, 48 N.Y.2d 408, 399 N.E.2d 59 (1979), the court held that the exemption was not unconstitutionally vague. It did not discuss other constitutional arguments advanced on equal protection grounds.

The opinion of the Supreme Court of Illinois did hold that the indictments under which the petitioners were charged were duplicitous, and therefore void. However, it reversed and remanded the judgments of the circuit court. New charges arising out of the same events may be brought by the state without encountering any statute of limitations problems. *See* Ill.Rev.Stat. 1989, ch. 38, ¶3-7(c).

The petitioners filed a timely petition for rehearing. In that petition, they once again pointed to the personal impact which the statute and the disputed exemption had upon them. The petitioners specifically directed the court's attention to *Arkansas Writers' Inc. v. Ragland*, 481

U.S. 221 (1987), which also involved a challenge to a statutory exemption. They further emphasized the expanded standing applicable under decisions of this Court when First Amendment freedoms are implicated.

On October 1, 1990, the Supreme Court of Illinois denied the petition for rehearing and issued a modified opinion. The modified opinion made no substantive changes. The mandate of the Illinois Supreme Court has been stayed pending review by this court.

REASONS FOR GRANTING THE WRIT

I.

A CRIMINAL OBSCENITY DEFENDANT HAS STANDING TO CHALLENGE A STATUTORY EXEMPTION AS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS UNDER PRINCIPLES FIRMLY ESTABLISHED BY THIS COURT.

This case raises an important question of standing in the First Amendment context. Petitioners, who were each criminally charged with obscenity, successfully challenged the Illinois obscenity statute as vague, and therefore violative of their rights under the First and Fourteenth Amendments to the Constitution of the United States. The statute was declared vague in its entirety because of a statutory exemption which was itself found to be vague. However, the Supreme Court of Illinois held that the petitioners lacked standing to raise the issue, finding that they did not have the requisite personal stake in the outcome. That decision both misapplied and ignored this Court's standing jurisprudence.

As this Court observed in *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the concept of "standing" has not always been clear in the opinions of the Court. *Id.* at 471, 475. "The term 'standing' subsumes a blend of constitutional requirements and prudential considerations" (*id.* at 471), with the former relating to the Article III "case or controversy" mandate and the latter being limitations established by this Court.

The standing issue in this case arises under the prudential component. These cases were criminal actions against the petitioners in state court, so no federal "case or controversy" dispute exists. The lower state court had jurisdiction over the proceeding pursuant to Article 6, §9 of the 1970 Constitution of the State of Illinois. The issue, then, is one of whether the state high court properly held that petitioners lacked standing to make the constitutional challenge, for a state court may not avoid a proper facial attack on federal constitutional grounds. *New York v. Ferber*, 458 U.S. 747, 767 (1982).

"Standing" in the prudential sense requires that the complaining party assert his own legal rights and interests. *Valley Forge, supra* at 474; *Secretary of State of Maryland v. Joseph H. Munson Co.*, Inc., 467 U.S. 947, 955 (1984). However, there are exceptions where speech protected by the First Amendment is at stake:

> Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in

> challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. 'Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Id. at 956-957.

The Supreme Court of Illinois incorrectly concluded that the petitioners had no personal stake in the constitutional attack. It reached that conclusion even though petitioners were charged with violating the very statute whose exemption provision was attacked. The exemption itself is applicable to any "dissemination", and therefore does not require an antecedent finding of obscenity.

While the Supreme Court of Illinois observed that the record did not reflect that petitioners claimed or intended to claim the exemption, there is nothing in Illinois criminal procedure which would require them to reveal any such claim or intent prior to trial. Affirmative defenses must be disclosed in felony prosecutions (Ill.Rev.Stat. 1985, ch. 110A, ¶413(d)), but not in misdemeanor ones. These cases were all misdemeanors. Any affirmative defense would be first raised at the time of trial.

As the Supreme Court of Illinois noted, the charges were based on alleged sales of obscene materials to

undercover police officers. Those circumstances directly raised the availability of the exemption, particularly in light of the comments from the drafting committee:

> The second defense is simply a recognition that *police*, social scientists, educational institutions, and other authorities may have a legitimate need to possess obscene material.
>
> S.H.A., ch. 38, ¶11-20, Committee Comments (emphasis added).

Nevertheless, the Illinois high court found that the petitioners had no personal stake.

When the Supreme Court of Illinois ultimately discussed the merits of the constitutional issue, it relied extensively on the opinion of the New York Court of Appeals in *People v. Illardo*, 48 N.Y.2d 408, 399 N.E.2d 59 (1979). Ironically, *Illardo* rebuffed a claim that the defendants lacked standing:

> The fact that appellant has not yet proceeded to trial does not divest him of standing to raise the statutory affirmative defenses. The moment that prosecution against him was mounted, appellant gained the right to rely on any legitimate defense, including those incorporated in §235.15.
>
> 48 N.Y.2d 408, 413 n.2, 399 N.E.2d 59, 61 n.2.

Two recent cases of this Court have addressed the question of standing where First Amendment challenges have been mounted against provisions which would exempt certain persons from the burden of the statute. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), held that the plaintiff, who published a general interest magazine in Arkansas, had standing to attack a

sales tax exemption which favored publications different from those which it produced. This Court rejected defense contentions that the plaintiff lacked standing, holding that it had a sufficient personal stake in the outcome of the litigation.

Another sales tax exemption was the focus of a constitutional challenge in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890 (1989). Relying on *Ragland*, this Court once again rejected a contention that the plaintiff lacked standing to challenge the constitutionality of the exemption. In so doing, it also cast aside defense arguments that the plaintiff had no personal stake because the proper course under state law would be to remove the exemption available to the exempted publications rather than extend it to the plaintiff's periodicals:

> It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether.
>
> *Id.*, 489 U.S. at ___, 109 S.Ct. at 896.

The Supreme Court of Illinois merely assumed that the exemption would be unavailable if the petitioners prevailed, and therefore concluded that they would gain nothing by a successful attack. However, it failed to recognize or address the very scenario which occurred in the lower court ruling. The exemption was deemed not to be severable from the balance of the Illinois obscenity statute, and that statute was therefore held unconstitutionally vague in its entirety.

The resolution of the standing issue below was also inconsistent with a recent decision of the United States

Court of Appeals for the Seventh Circuit. In *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990), that court held that persons subject to an obscenity statute had standing to bring an attack directed toward an exemption under the obscenity statute. In so holding, the Seventh Circuit specifically relied upon *Ragland*.

Even if it could be said that the petitioners lacked a personal stake in the outcome of the facial constitutional attack, the Supreme Court of Illinois completely ignored the established basis for standing where First Amendment rights are implicated. Such standing is available regardless of whether the claim is grounded on allegations of vagueness or overbreadth. *See Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982).

It is beyond dispute that defectively drawn obscenity statutes infringe on First Amendment rights. *See Miller v. California*, 413 U.S. 15 (1973). Here, the subject obscenity statute involves an exemption which is applicable regardless of whether the materials at issue are obscene. Its completely unpredictable applications underscores its apparent invalidity and serves only to cast a further chill over the First Amendment rights of petitioners and others. This Court should grant *certiorari* to correct the misguided application of the "standing" doctrine by the lower court.

II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS ON THE CONSTITUTIONALITY OF THE STATUTORY EXEMPTION IS IN CONFLICT WITH A DECISION OF THE HIGHEST COURT OF ANOTHER STATE.

The affirmative defense provision which the trial court held to be unconstitutionally vague provides as follows:

> It shall be an affirmative defense to obscenity that the dissemination:
>
> * * *
>
> (2) Was to institutions or individuals having scientific or other special justification for possession of such material.
>
> Ill.Rev.Stat. 1985, ch. 38, ¶11-20(f)(2).

The Supreme Court of Illinois, however, disagreed with the trial court's finding. In addition, it failed to address the equal protection claim which was advanced by petitioners.

A criminal statute is void for vagueness and, therefore, violative of due process, if it is not sufficiently definite so that ordinary persons can understand what conduct is prohibited. It must be drafted in a manner which does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Vague laws fail to provide fair warning and, as a consequence, trap the innocent. Likewise, they encourage arbitrary and discriminatory application by impermissibly delegating their enforcement to the subjective determinations of policemen, judges, and juries. Where First Amendment freedoms are involved, they also serve to

chill the exercise of those freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

The language of the exemption was taken from a draft of the Model Penal Code (Model Penal Code, tent. draft no. 6, §207.10(4)). However, the version of the Model Penal Code ultimately adopted by the American Law Institute added the words "educational" and "governmental" and changed "special" to "similar". Model Penal Code, §251.4(3)(a) (1980).

The highest courts of two other states have had occasion to address the phase of "other similar justification" in combination with "scientific, educational, and governmental". The New York Court of Appeals held that exemption not to be unconstitutionally vague in *People v. Illardo*, 48 N.Y.2d 408, 399 N.E.2d 59 (1979). However, the Kansas Supreme Court held the same language to be unconstitutionally vague in *State v. Next Door Cinema Corp.*, 225 Kan. 112, 587 P.2d 326 (1978). *See also State v. Starr Enterprises, Inc.*, 226 Kan. 288, 597 P.2d 1098 (1979). Although the Kansas high court found the infirm provision to be severable from the remainder of the obscenity statute, the Supreme Court of Illinois did not even get that far.

The Illinois exemption provision is even more obtuse than the exemption language at issue in *Illardo* and *Next Door Cinema Corp.* While the word "similar" might appear to refer to antecedent words, the word "special" carries no such connotation. Furthermore, unlike the New York and Kansas exemptions, the Illinois statute does not provide several classes of persons or things from which the word "special" could draw meaning. These deficiencies

render the Illinois exemption so vague as to be violative of due process.

Although not addressed by the Supreme Court of Illinois, the exemption at issue also has significant equal protection problems. This infirmity is present regardless of whether a strict scrutiny test is applied (*see Carey v. Brown*, 447 U.S. 455, 461-462 (1980)), or a rational basis test is utilized (*see Zobel v. Williams*, 457 U.S. 55, 60 (1982)).

In *State v. Luck*, 353 So.2d 225 (La. 1977), the Supreme Court of Louisiana held unconstitutional on equal protection grounds a provision establishing exemptions for various institutions and individuals. After reviewing its obscenity statute, the Louisiana Supreme Court concluded that it was directed at trafficking in obscenity for commercial gain. It then invalidated the exemption because the exempted institutions and persons would be able to commercially traffic in the materials.

On its face, the Illinois obscenity statute appears also to be directed towards materials disseminated for commercial gain. In fact, the committee comments state that the statute was "aimed primarily at the commercial dissemination of obscenity." *See* S.H.A., ch. 38, ¶11-20, Committee Comments. An essential element of the affirmative defense contained in subsection (f)(1) is that the dissemination "[w]as not for gain . . . " In addition, the committee comments note that "[t]he two affirmative defenses listed there have the effect of reserving criminal punishment for those situations in which the obscenity is disseminated to strangers for gain."

Lack of any gain is not a condition of subsection (f)(2). Even materials which are obscene may be sold for

gain to whatever institutions or individuals fall within the scope of subsection (f)(2), thereby totally defeating the concept of criminalizing the commercial exploitation of obscenity. In more specific terms, an arbitrary distinction is drawn between classes of people who sell obscene materials for gain. If the recipient is in the protected category, then the disseminator escapes punishment. If not, then the disseminator is punished.

The exemption scheme provided under the Illinois obscenity statute is aggravated by the fact that the disseminator of the materials is not required to have knowledge of the recipient's purpose. The defense is available on a fortuitous, post hoc examination of the purpose of the recipient. Those persons who unknowingly distribute to an exempt person have the defense despite their lack of knowledge. Others, who have done no more than commit the same act with the same mental state, are subject to punishment because they have not had the good fortune of making the dissemination to an exempt person or institution. These circumstances epitomize an equal protection violation – where the law unequally treats those who committed intrinsically the same quality of offense by punishing one and not the other. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The approach of the Supreme Court of Illinois on the merits of the constitutional claims asserted under the First and Fourteenth Amendments is at odds with the decision of the highest court of another state on both the due process aspect and the equal protection component. This Court should grant certiorari to resolve the conflict.

CONCLUSION

The decision of the Supreme Court of Illinois on the standing question is in conflict with decisions and principles announced by this Court. Its conclusions on the merits of the constitutional challenge are also in conflict with at least one decision of the highest court of another state. This Court should grant a writ of certiorari to review the judgments and opinion of the Supreme Court of Illinois.

Respectfully submitted,

GLENN A. STANKO
RENO, O'BYRNE & KEPLEY, P.C.

501 West Church Street
P.O. Box 693
Champaign, IL 61824-0693
(217) 352-7661

Attorneys for Petitioners

EXHIBIT A

OPINION MODIFIED ON DENIAL OF REHEARING - 10/1/90
ORIGINAL OPINION FILED - 5/23/90

Docket Nos. 67480, 67481, 67482, 67483 cons. - Agenda 12 - March 1989.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant v. CAPITOL NEWS, INC., Appellee. - THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. CENTRAL VIDEO MIDWEST, Appellee. - THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. GENTLEMEN'S ADULT BOOKSTORE, INC., Appellee. - THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. PHILLIP D. MORGAN, Appellee.

JUSTICE WARD delivered the opinion of the court:

Capitol News, Inc., upon being charged by indictment in the circuit court of McLean County with the sale or delivery of materials in violation of the Illinois obscenity statute (Ill. Rev. Stat. 1987, ch. 38, par. 11-20), filed a motion to dismiss, challenging the constitutionality of the statute. The circuit court held that the affirmative defense established by section 11-20(f)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1987, ch. 38, par. 11-20(f)(2)) was unconstitutionally vague. Based on its finding that the affirmative defense was not severable from the remainder of the statute, it held that the obscenity statute was unconstitutional and dismissed the indictment. This direct appeal by the State is before us pursuant to Supreme Court Rule 603 (107 Ill.2d R. 603).

The affirmative defense provides: "It shall be an affirmative defense to obscenity that the dissemination

* * * [w]as to institutions or individuals having scientific or other special justification for possession of such material." (Ill. Rev. Stat. 1987, ch. 38, par. 11-20(f)(2).) The trial court ruled that the language "scientific or other special justification" was unconstitutionally vague.

At the time Capitol News was indicted, similar indictments were returned against General Video Midwest (People v. General Video Midwest, No. 67481), against Gentlemen's Adult Bookstore, Inc. (People v. Gentlemen's Adult Bookstore, Inc. No. 67482), and against Phillip D. Morgan (People v. Morgan, No. 67483). Similar motions to dismiss were filed by the defendants and similar dispositive orders were entered in each. Appeals were filed and were consolidated by this court.

The first question raised involves the defendants' attack on the jurisdiction of this court over the appeals. Here, the notice of appeal was not filed within the 30-day period required by Supreme Court Rule 606(b) (107 Ill. 2d R. 606(b)). Under these circumstances, any review must be sought pursuant to the provisions of Rule 606(c) (107 Ill. 2d R. 606(c)). That section provides that after 30 days, review may be sought by filing a motion for leave to appeal in the reviewing court. If this motion is filed within the next 30 days, it, to be allowed, must be supported by a showing of "reasonable excuse" for the late filing. The rule also permits such a motion to be filed within six months of the expiration of the appeal period supported by an affidavit showing that there is merit to the appeal and that the failure to timely file was not due to the appellant's culpable negligence. Under either of these circumstances, the court may grant leave to appeal. 107 Ill. 2d R. 606(c).

Here, the State sought leave to appeal on the sixtieth day after the entry of the written order of dismissal. The motion and an accompanying affidavit stated that the notice of appeal was not filed within the 30-day period "due to clerical error," and that, within the 30-day period, the assistant State's Attorney in charge of the case directed that a notice of appeal be filed. He did not become aware that it had not been filed until 59 days after the order had been entered. The motion for leave to appeal was filed the next day.

The State's motion for leave to appeal was granted by the full court over objections by the defendants that the State had failed to provide a "reasonable excuse" for the late filing and that the "clerical error" excuse is factually insufficient. The defendants now argue that although this court granted the State's motion for leave to appeal, it is appropriate to reconsider the matter based on a full consideration of the record and the briefs and argument of counsel. The defendants base this position on *People v. Robertson* (1968), 39 Ill. 2d 621. In *Robertson*, this court had granted the defendant's motion for leave to appeal because at the time the motion was granted, it appeared that the defendant had a "reasonable excuse" for the delay in filing. The defendant had asserted in the motion for leave to appeal that he was not present at the time of the sentencing and did not know that he had been sentenced to the penitentiary. After a full consideration of the record, and the briefs and argument of counsel, it was discovered that the defendant had voluntarily absented himself for the trial, and had thereby waived the right on which he had predicated his petition. Accordingly, this

court ruled that leave to appeal had been improvidently granted. *Robertson*, 39 Ill. 2d at 624.

The defendants argue that the State's motion here was similarly improvidently granted because the preparation and filing of a timely notice of appeal was not merely a clerical task and because the State failed to provide factual support for its contention of excusable clerical error. Unlike *Robertson*, however, where the plenary consideration of the case revealed facts not known to the court when the petition for leave to appeal was considered, the defendants here are merely requesting the court to reconsider the arguments it had rejected when it granted leave to appeal. The request must be denied. The petition for leave to appeal was timely filed, and it was granted by the full court in the exercise of the discretion it possesses under Rule 606(c). No facts that were unknown when the determination was made have been brought to our attention. This court has jurisdiction to consider the merits of the appeal.

The State contends that the defendants had no standing to challenge the constitutionality of the affirmative defense provision on grounds of vagueness, and that even if a proper challenge had been made, section 11-20(f)(2) is constitutional. The State says that standing under these circumstances is a matter of subject matter jurisdiction and may be considered by the court even where neither party raised the question. (*City of Chicago v. Fair Employment Practices Comm'n* (1976), 65 Ill. 2d 108, 112; *Pre-School Owners Association of Illinois, Inc. v. Department of Children & Family Services* (1988), 119 Ill. 2d 268, 287.) The Supreme Court's citation in *County Court v. Allen* (1979), 442 U.S. 140, 154-55, 60 L. Ed. 2d 777, 790, 99

S. Ct. 2213, 2223, of *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 610, 37 L. Ed. 2d 830, 838, 93 S. Ct. 2908, 2914, is pertinent:

> "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 37 L. Ed. 2d 830, 93 S. Ct. 2908."

This court in *Rosewood Corp. v. Fisher* (1970), 46 Ill. 2d 249, 259, put it:

> "It has been stated many times that this court 'will not determine the constitutionality of the provisions of an act which do not affect the parties to the cause under consideration, or where the party urging the invalidity of such provisions is not in any way aggrieved by their operation.' *Schreiber v. County Board of School Trustees of Peoria County*, 31 Ill. 2d 121, 125, and cases there cited."

Kujawinski v. Kujawinski (1978), 71 Ill. 2d 563, 569, considered a trial court's holding of unconstitutionality of a statute, which the plaintiff, to whom the statute was not applicable, claimed to be invalid. This court, citing *Rosewood Corp. v. Fisher* (1970), 46 Ill. 2d 249, held that the trial court erred in declaring the sections unconstitutional, observing:

> "Neither section is applicable to the plaintiff, who alleges only that he was a party to a divorce action pending in the circuit court of Cook County. This court has often propounded

> that '[i]t is axiomatic that one may not complain of a statutory provision which does not affect him' (*Spalding v. City of Granite City* (1953), 415 Ill. 274, 283), and that a court may not 'determine the constitutionality of the provisions of an act which do not affect the parties to the cause for consideration.' " *Kujawinski*, 71 Ill. 2d at 569-70.

Section 11-20(f)(2) provides an affirmative defense when obscene materials have been disseminated "to institutions or individuals having scientific or other special justification for possession of such material." (Ill. Rev. Stat. 1987, ch. 38, par. 11-20(f)(2).) The record here shows that the persons to whom the obscene materials were sold or delivered were undercover police officers. Nowhere in the record is there any claim that the defendants asserted or intended to assert the affirmative defense or that they fell within the scope of this exempting section. The fact that the defendants will gain nothing if their attack on the exemption is upheld establishes they have no standing to challenge the constitutionality of the affirmative defense. Whether they win or lose on the issue will have no impact of them at all. There is no adverseness of parties when the party attacking a statute does not stand to gain if the attack is sustained. Our constitution limits the jurisdiction of the circuit courts to "justiciable matters" (Ill. Const. 1970, art. VI, § 9), and absent a justiciable controversy, courts lack subject matter jurisdiction. An absence of subject matter jurisdiction cannot be waived by the parties, and may be raised by this court *sua sponte*. (*Eastern v. Canty* (1979), 75 Ill. 2d 566; see also R. Michael, Civil Procedures Before Trial § 2.1 (1989).) Because the defendants lack standing to address the question of the constitutionality of the affirmative defense, the circuit

court erred in considering the constitutional question and in subsequently dismissing the indictments. Its judgment of unconstitutionality will be reversed.

Were we to conclude our consideration of this appeal by simply reversing the judgment on the ground of lack of standing, it would leave the question of constitutionality unaddressed. Too, the trial court erroneously held that indictments not to be duplicitous. The parties have briefed these questions and we shall consider them. We judge that the trial court erred in holding the statute unconstitutional. As we have stated above, the affirmative defense section of the obscenity statute provides:

> "It shall be an affirmative defense to obscenity that the dissemination:
>
> * * *
>
> (2) Was to institutions or individuals having scientific or other special justification for possession of such material." Ill. Rev. Stat. 1987, ch. 38, par. 11-20(f)(2).

The provision "having scientific or other special justification" was held by the trial court to be unconstitutionally vague. Its order read in part:

> "Though the affirmative defenses may not be violative of the equal protection and due process clauses under the United States Constitution and Illinois Constitution, there is the real question whether the use of the term 'scientific or other special justification' is unconstitutionally vague. No Illinois cases are specifically on point. The court finds that the use of the phrase 'scientific or other special justification' makes the affirmative defenses unconstitutionally vague. See, *People v. Howell* (1977), 90 Misc. Id. 722; 395 N.Y.S. 2d 933."

(As we shall point out, the New York Court of Appeals in *People v. Illardo* (1979), 48 N.Y.2d 408, 399 N.E.2d 59, 423 N.Y.S.2d 470, decided the question contrary to *Howell*, which was a trial court decision in the city court of Buffalo in 1977.)

To avoid a complaint of vagueness and to satisfy due process, a statute must give a person of ordinary intelligence reasonable opportunity to know what conduct is lawful under it and what is prohibited and must provide standards to guide persons who administer the law so that there will not be arbitrary and discriminatory enforcement of the statute. An impossible standard of preciseness of language and expression cannot be required; it is enough that the law's language and meaning are sufficiently definite when measured by common understanding and practices. *People v. Illardo* (1979), 48 N.Y.2d 408, 399 N.E.2d 59, 423 N.Y.S.2d 470.

The language of section 11-20(f)(2) is based on the idea and language of exemption in the Model Penal Code (Model Penal Code par. 251.4(3)(a) (1980)) and in exemption provisions of a number of State obscenity statutes. The sixth tentative draft of the Model Penal Code provided exemption for dissemination of obscenity "to institutions or individuals having scientific or other special justification for possession of such material." The affirmative defense in the final draft of the Code reads: "To institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material." There have been challenges to the constitutionality of the affirmative defense in the final draft of the Code and in statutory affirmative defenses with similar language. The decisions have been mixed.

An exemption provision with language very similar to that in the Code's final draft was considered in *People v. Illardo* (1979), 48 N.Y.2d 408, 399 N.E.2d 59, 423 N.Y.S.2d 470. The court held that the constitutional requirements for providing notice of conduct that was proscribed and for avoiding arbitrary enforcement were satisfied by the language of the affirmative defense. Regarding arbitrary enforcement the court observed:

> "[W]here the statute deals not with a proscription itself but, instead, with affirmative defenses, statutory provisions which become relevant only after an arrest is made and charges are filed, any uncertainty in its terms is far less likely to be an inducement to irresponsible law enforcement." *Illardo*, 48 N.Y.2d at 414, 399 N.E.2d at 62, 423 N.Y.S.2d at 472-73.

The court, considering the "or other similar justification" language in the affirmative defense, stated that the language simply represented use of a common drafting technique designed to avoid the necessity of spelling out every pertinent contingency where the statute might be applicable. The court noted that this technique involved the use of *ejusdem generis*, under which doctrine the effect of the language "or other similar justification" was to limit other justifications to the kind of justifications, *e.g.*, scientific, which preceded the phrase. (*People v. Illardo* (1979), 48 N.Y.2d 408, 399 N.E.2d 59, 423 N.Y.S.2d 470.) As stated, the language used in our statute, "scientific or other special justification," is taken from the sixth tentative draft of the Model Penal Code. It is clear "or other special justification" refers to a kind of justification similar to a justification that is scientific. The reference is to

justification or freedom from blame. Justification for possessing obscene material plainly refers to a possession that is recognized as one not inconsistent with the proscriptive purpose of the obscenity statute.

There is no real difference between the final version of the affirmative defense of the Model Penal Code, the New York statute and our statutory affirmative defense. It has been recognized that there may be a legitimate need for the study of obscene material and the insertion in the affirmative defense of phrases like "or other similar justification for possession of obscene material" and "or other special justification for possessing such material" is a practical and reasonable means of avoiding the nearly impossible, if not impossible, effort to list in the statute all possible circumstances when public policy would favor exemption from prosecution.

We hold that the exempting language of the statute is not unconstitutionally vague. Decisions other than *Illardo* that have approved the exempting language of the final draft of the Code or comparable language include: *Commonwealth v. Ferro* (1977), 372 Mass. 379, 361 N.E.2d 1234; *State v. Davis* (Tenn. 1983), 654 S.W.2d 688; *400 E. Baltimore Street, Inc. v. State* (1981), 49 Md. App. 147, 431 A.2d 682.

As we have stated, the trial court, contrary to the defendants' argument, held the indictments involved were not duplicitous. The indictments charged that the defendants "sold or delivered * * * an obscene magazine." The defendants argued that the indictments here charged acts which were disparate and alternative acts, either one of which would constitute an offense. Thus,

the defendants say each count of the indictments charged two crimes, making the count void. This court in *People v. Heard* (1970), 47 Ill. 2d 501, considered questions involved in charging a defendant in the disjunctive:

> "The complaint, following the language of the [offense of gambling] statute, charged the defendants in the disjunctive, that is, it charged that the defendants set up a policy game or promoted a policy game or sold tickets and so on. While a charge which follows the language of the statute defining the crime and uses the disjunctive 'or' will be sufficient under some circumstances, it will not be sufficient where the statute names disparate and alternative acts, any one of which will constitute the offense. * * * The statute here named specific acts which constitute the crime of gambling, some of which acts are clearly disparate and alternative. The promoting of a policy game is not the same act as transferring a policy ticket, for example. The use of the disjunctive under these circumstances causes uncertainty and conjecture as to which of the alternatives the accused is charged with committing.
>
> The result was that the complaint was void because it did not set forth the nature and elements of the charge with the certainty required by the Federal constitution (U.S. Const., art. VI), our constitution (Illinois Const., art. II, sec. 9) and section 111-3 of our Code of Criminal Procedure. Ill. Rev. Stat. 1967, ch. 38, par. 111-3." *People v. Heard*, 47 Ill. 2d at 504-05.

The statute involved provides that it is a crime if a person intentionally or recklessly "[s]ells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing." (Ill. Rev. Stat. 1987, ch. 38, par. 11-20(a)(1).) Thus it describes disparate and alternative

acts, the performance of any one of which constitutes the offense. Acts of sale and of delivery are alternative and disparate acts. It is not necessary that a delivery be a sale; material can be delivered without having been sold. A sale may not involve delivery of what is sold. The proof of one may not be proof of the other. We consider the indictments involved were void for duplicity.

For the reasons given, the judgments of the circuit court of McLean County are reversed and the causes are remanded to that court.

Judgments reversed;
causes remanded.

EXHIBIT B

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MC LEAN

PEOPLE OF THE STATE OF ILLINOIS,	)	Order Entered June 3, 1988
Plaintiff,	)	CASE #86 CM 814
vs.	)	
CAPITOL NEWS, INC.,	)	
Defendant.	)	

ORDER

Cause comes on for hearing on Defendant's Motion to Dismiss and Supplemental Motion to Dismiss, Defendant having appeared by Counsel Glenn Stanko, People of the State of Illinois having appeared by Assistant State's Attorney William Yoder, argument having been presented by respective counsel, the Court having taken said cause under advisement and having examined points of authority submitted by respective counsel finds as follows;

1. The Illinois Obscenity Statute, Illinois Revised Statutes 1985, Ch.38, § 11-20, is not unconstitutionally vague and indefinite for using such phrases as contemporary adult standards; purient interests, patently offensive, or the lack of serious literary, artistic, political, or scientific value. The use of such terms has been litigated quite frequently and have been found to meet all constitutional tests. See, *Miller v. California*, 413 U.S. 15, *People v.*

Hall, 143 Ill.App.3rd 315, *People v. McGeorge*, 156 Ill.App.3rd 860.

2. The Court finds that the mental state, "recklessly failing to exercise reasonable inspection" is a sufficient mental state upon which to predicate liability from criminal obscenity.

3. The charge is not rendered uncertain and vague by using the words "sold or delivered" obscene magazines or materials. Said words are intimately associated in meaning, and therefore do not render the indictment or statute unconstitutionally vague, or duplicitous. See, *People v. Oulson*, 37 Ill.App.3rd 912.

4. The Court finds that there are sufficient reasonable inferences to be drawn from the evidence and the testimony presented at the grand jury to support the indictment against this Defendant, and therefore this Court will not disturb said indictment. Also, the Court does not find that there is sufficient prosecutorial misconduct to quash or dismiss the indictment.

5. Subsection (f)(2) of the obscenity statute relating to affirmative defenses does give the Court a bit more concern. Though the affirmative defenses may not be violative of the equal protection and due process clauses under the United States Constitution and Illinois Constitution, there is the real question whether the use of the term "scientific or other special justification" is unconstitutionally vague. No Illinois cases are specifically on point. The Court finds that the use of the phrase "scientific or other special justification" makes the affirmative defenses unconstitutionally vague. See, *People v. Howell*, 90 Misc.Id 722; 395 N.Y. 52d [sic] 933.

6. The next question is to determine whether in fact the affirmative defense section of the statute may be served from the remainder of the statute. The Court is to attempt to uphold a statute, if at all possible. A phrase or section of a statute may be severed if it does not change the meaning or intent of the entire statute. In the case at bar, it would seem that severing the affirmative defense section would change the intent and meaning of the entire statute. Therefore, this Court finds that the Motion to Dismiss should be granted as the statute is unconstitutionally vague.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss be and hereby is ordered granted.

Dated this 3rd day of June, 1988.

ENTER:

/s/ Joseph H. Kelley
-JUDGE-

EXHIBIT C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

October 1, 1990

Mr. Glenn A. Stanko
Reno, O'Byrne & Kepley
501 West Church St.
Champaign, Ill. 61820

Nos. 67480
67481
67482
67483
Cons. – People State of Illinois, appellant, v. Capitol News, Inc., et al., appellees. Appeals, Circuit Court (McLean).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Opinion modified on denial of rehearing.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 11, 1990.

EXHIBIT D

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within this jurisdiction the equal protection of the laws.

EXHIBIT E

Illinois Obscenity Statute
Ill.Rev.Stat. 1985, Ch. 38, ¶11-20

11-20 Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature of content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.